AIR CONDITIONING SYSTEMS DESIGN SDN BHD

v.

CHUAH TEONG HOOI & ANOR & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEALS NOS: P-02-603-1995 & P-02-604-95]
1 OCTOBER 1998

CIVIL PROCEDURE: *Want of prosecution - Striking out - Whether plaintiff guilty of inordinate delay - Whether gaining an unfair advantage - Whether defendants prejudiced by delay - Rules of the High Court 1980, O. 34 r. 2(2)*

CIVIL PROCEDURE: *Res judicata - Final judgment - Final judgment against purchaser for price of goods - Subsequent action for declaration that property in goods had not passed - Whether res judicata - Whether plaintiff's right had merged in final judgment*

CIVIL PROCEDURE: *Judgments and orders - Non-compliance - Summons for direction - Plaintiff filed summons for direction but did not obtain any order thereon - Whether could invoke O. 24 r. 16 Rules of the High Court 1980 and enter judgment - Whether O. 24 inapplicable - Rules of the High Court 1980, O. 24 r. 2(1), O. 24 r. 16, O. 25*

Pursuant to agreements that it had executed with one Avtech Sdn Bhd ('Avtech'), the plaintiff/appellant had delivered and installed an air conditioning system and other equipment ('the good') on the premises of Atlas Electronics (M) Sdn Bhd ('Atlas') and Amtech Industries (M) Sdn Bhd ('Amtech'). Subsequently, the appellant sued Avtech for the price of the goods and obtained final judgment thereon. In December 1995, the appellant filed an action against Atlas, Amtech and the respondents seeking for declaration that it still retained the property in the goods ('the first action'). Following that, on 18 September 1986, the High Court made an order for an early trial of the action. The appellant, however, ignored the order and no summons for directions or any other proceeding was taken out in the matter. That being so, the defendants in the first action applied to dismiss the first action for want of prosecution arguing, *inter alia,* that they were prejudiced by the delay to prosecute.

The facts showed that, having obtained the final judgment against Avtech, the appellant had also filed an action against the respondents only, wherefore it claimed the same relief as in the first action ('the second action'). In consequence, an order was made by the relevant High Court on 29 September 1986 for the second action to be tried together with the first action. It was also evident that, in respect of the second action, the appellant had, on 27 September 1989, obtained an order directing that the action be set down for trial within 60 days. The appellant, however, had not complied with this order and had not even served the sealed copy thereof on the respondents. This notwithstanding, on 7 August 1992, the appellant served the respondents with a list of documents, and an affidavit verifying the list, *albeit* without applying for any enlargement of time. The respondents alleged that the appellant had failed to take any steps for trial since 27 September 1989, and in any case had failed to expeditiously prosecute the second action, and so applied to dismiss the second action, also for want of prosecution.

The appellant, in retort to the respondents' application in the second action, filed an application under O. 24 r. 16 Rules of the High Court 1980 ('the RHC') whereby it sought to strike out the appellant's defence and to enter a default judgment against the respondents.

The learned judge, having heard the two actions together, ruled that (i) O. 24 r. 16 of the RHC had no application to the circumstances of the case (ii) the respondents were prejudiced by the appellant's inordinate delay in prosecuting the two actions (iii) the property in the goods had passed to Atlas, Amtech and the respondents, and (iv) the appellant's actions were tainted with *res judicata* as the appellant's rights had already merged in the final judgment. The learned judge, in consequence, allowed the respondents' applications in respect of the first and second actions, and dismissed the appellant's application in respect of the second action. The appellant appealed.

Held:

[1] The learned judge had exercised his discretion on correct principles and had not committed any error. The learned judge's reasons for granting the order prayed for by the respondents could not in any way be faulted.

[2] The appellant was ordered by the court on 18 September 1986 to have the first action tried on a priority basis. The appellant had not taken out summons for direction or any proceeding to that effect, and only moved on 30 September 1994 when it filed the affidavit in question. The appellant, hence, had plainly ignored the said order for early trial.

[3] The respondents were right in maintaining that the delay in the first action had prejudiced them. It is clear that the respondents' material witnesses, some of whom were foreigners, could not be located or could be located only with great difficulty. The delay had given the appellant an unfair advantage.

[4] As for the second action, the appellant's failure to obey the court's order is the main reason for the delay and for that it should be dismissed. The appellant had clearly been guilty of inordinate delay and had not prosecuted expeditiously.

[5] The learned judge was right in the ruling that O. 24 r. 16 of the RHC had no application in this case. The appellant's failure in the main was to act under O. 25 and not O. 24 of the RHC.

[6] The learned judge was right in holding that the appellant could not raise the cause of action against the respondents in the first and second actions on the grounds that the appellant's rights in respect of the goods had merged in the final judgment. Clearly, under the circumstances, the plea of *res judicata* would have been available to the respondents.

[7] The appellant cannot succeed on its application to strike out the respondents' defence in the second action. Whilst alleging delay on the part of the respondents to comply with the court order of 27 September 1989 directing the parties to serve on each other a list of documents within 14 days, the appellant had itself been guilty of not complying with that order, thereby prejudicing the respondents' position. Without applying for extension of time, the appellant had clearly been guilty of delay itself.

[Appeal dismissed.]

Case referred to:
Henderson v. Henderson [1843-60] All ER Rep 378 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 24 rr. 2(1), (7), 16, O. 25 r. 1(4), O. 34 r. 2(2)

Other source referred to:
Osborn's Concise Law Dictionary

For the appellant - Gan Teik Chee; M/s Gan Teik Chee & Ho
For the respondents - Izabella De Silva; M/s Iza Ng Yeoh & Kit

[Appeal from High Court, Pulau Pinang; Civil Suit Nos: 1618-1985 & 1643-1985]

Reported by WA Sharif

JUDGMENT

Shaik Daud Ismail JCA:

I have read both the judgments of my learned brothers Abu Mansor Ali, JCA and Abdul Malek, JCA, in draft and I agree with their conclusions that both the appeals be dismissed with costs and the deposits to go to the respondents to the account of their taxed costs.

Abu Mansor Ali JCA:

The appellants in both suits appeal against our decisions given on 18 August 1998 dismissing with costs both their appeals against the decisions of the learned judge from Pulau Pinang dated 23 August 1995 allowing the defendants' applications in encl. (26), to strike out the plaintiffs statement of claim for reason of non prosecution, also allowing the defendants application in encl. (43) to strike out the defendants' statement of defence with costs.

We heard substantive arguments of counsel for the appellant and respondents and we came to the conclusion that the appeals were without merit and we held it was trite law that we would not lightly disturb the learned judge's very careful and reasoned judgment in their very complex applications. In both appeals the learned judge gave one lengthy judgment. Following the learned judge's judgment, we heard both appeals No 13 P-02-603-95 and No 14 P-02-604-95 together with the consent of all parties. Before the start of the appeals, we also granted as prayed in terms of two motions to amend the amended memorandum of appeals with no objection from the respondents. For ease of reference, we will call the appellant as plaintiff and the respondents as defendants.

In order that we may not go into any confusion we set down here how the learned trial judge treated the various enclosures before him and in respect of which cases. We quote:

> I would like to preface this judgment by stating that the grounds of judgment herein (Suit 22-1643-1985) are in respect of decisions made on enclosure (26) in this action and enclosures (37) and (43) in Suit 22-1618-1985 in the High Court in Malaya at Penang between:
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> Airconditioning Systems
>
> Design Sendirian Berhad ... Plaintiff

And

1. Chuah Teong Hooi
2. Anthony Geoffrey
   [as receivers and managers of the property of Atlas Intek (M) Sendirian Berhad] ... Defendants

which suit shall hereinafter be referred to as "the related suit". Arguments on the said enclosures were, at the request of the parties, taken together, hence this single judgment involving all three enclosures together. Any reference in this judgment to any of these enclosures by itself shall be a reference to that enclosure as specified above.

It may assist the understanding of these appeals as if we give the facts of this case. They are as follows.

On 5 September 1994 the defendants filed an application in encl. (26) to dismiss this action for want of prosecution pursuant to O. 25 r. 1(4) or the inherent jurisdiction of the court. The application was supported by an affidavit at encl. (25) affirmed on behalf of the defendants by one Hoh See Lee ("Hoh's affidavit") who was in the employ of the third and fourth defendants, the receivers and managers of the first and second defendants.

By Hoh's affidavit the defendants averred that the plaintiff had filed its claim against them on 27 December 1985 on the ground that they had failed to permit the plaintiff to remove an airconditioning system and other equipment ("the goods") it had delivered to and installed on the first and second defendants' premises pursuant to agreements which the plaintiff had entered into with a company called Avtech Construction Sendirian Berhad ("Avtech"). The defendants had filed their defence on 18 April 1986.

He further stated that on 18 September 1986, Mr Justice Edgar Joseph Jr (as his Lordship then was) made an order, *inter alia*, for priority to be given for the early trial of this action. On 2 April 1987, a notice of change of solicitors was filed on behalf of the plaintiff, followed by another change to the present solicitors on 12 June 1990. Since 18 September 1986 until the affirming of his affidavit on 30 August 1994, Hoh stated that the plaintiff had ignored the order and failed to take out a summons for directions or any other proceeding in the matter.

He contended that the excessive and inordinate delay on the part of the plaintiff in prosecuting this action had prejudicially affected the defendants in that the witnesses who would be required for the trial could not be located or could not be located without great difficulty, particularly the former directors or employees of the first and second defendants (which companies had become insolvent), who had previously been involved in what took place and who were

named in documents produced by the plaintiff in this action. On the other hand, the directors of the plaintiff were readily at hand to support the plaintiffs case at trial. By delaying the prosecution of this action, the plaintiff had given itself an unfair advantage over the defendants to the prejudice of the defendants. This was unjust as the defendants were not able to defend this action appropriately as a result thereof. The plaintiff did not have any good reason for the delay or for ignoring the order of the court for the action to be given priority for early trial.

Hoh further averred that by another order of the court made on 29 September 1986 in the related suit, which had also been instituted by the plaintiff in this action, another judge, Mr Justice Mohamed Dzaiddin (as his Lordship then was), had directed that the related suit be tried at the same time as this action was tried. The plaintiff had similarly failed to prosecute that related suit and the defendants therein had also made an application to dismiss the same for want of prosecution.

That, essentially, was what was contained in Hoh's affidavit.

In the related suit, the third and fourth defendants in this action were cited as the only two defendants there in their capacity as receivers and managers of a company called Atlas Intek (M) Sendirian Berhad. The claim against the defendants in the related suit was similar to that in this action.

The application by the defendants in encl. (37) in the related suit to strike it out for want of prosecution was made pursuant to O. 34 r. 2(2) or the inherent jurisdiction of the court.

The said Hoh again affirmed an affidavit, at encl. (36), in support of the application at encl. (37) in the related suit. The factual averments therein are similar to those in this action except that in the related suit the plaintiff had filed a summons for directions (encl (26)) on 23 January 1987 but had failed to proceed with the hearing of the same or obtain any order thereon. However, on 18 May 1989, the plaintiff, after having changed its solicitors, had filed a further summons for directions (encl. (28)) and obtained an order on 27 September 1989 directing that the related suit be set down for trial within sixty days thereof. A sealed copy of this order had never been served upon the defendants. However, on 7 August 1992, the plaintiff had served on the defendants a list of documents and an affidavit verifying the list.

Hoh also stated in his affidavit at encl. (36) in the related suit that the plaintiff had ignored the two court orders therein and failed to take any steps in the matter since 27 September 1989 by setting down the related suit for trial or otherwise prosecuting it. The same reasons for prejudice to the defendants were advanced as earlier adverted to in relation to this action.

The plaintiff then filed an application at encl. (43) in the related suit to strike out the defence for failure to comply with the order of court of 27 September 1989 directing the parties to serve on each other a list of documents and an affidavit verifying the same within fourteen days of the order and seeking to enter judgment for the plaintiff pursuant to O. 24 r. 16.

A director of the plaintiff averred in the related suit that the plaintiff had on 3 August 1992 complied with this order of the court when its list of documents, and the affidavit verifying the list was affirmed, and both were filed. The plaintiff complained that the defendants were guilty of contumelious conduct by not complying with the order of the court dated 27 September 1989 with which it had complied. However, it is to be noted that the plaintiff did not explain how the plaintiff itself was not equally guilty of the same contumelious conduct it complained of when it failed to file the affidavit and list in question within the fourteen-day timeframe specified in the order of the court and proceeded to file without first applying for and obtaining an order for enlarging of time.

A number of affidavits were filed in both this action and the related suit, with accusations and counter-accusations being levelled by the parties at each other for the delay.

Before us appellants' counsel Mr Gan Teik Chee, in his first ground of appeal, contended that the learned judge erred when he held at p. 12 of his written judgment that the plaintiff, having obtained judgment for the price of the goods in an earlier judgment, could not be allowed to claim again for the return of the same goods. I quote the fine judgment of the learned judge:

> But what was even more relevant to my fact that the plaintiff obtained a final judgment against Avtech on 28 October 1985 (before instituting this action and the related suit) for the price of the same goods in question in Suit 22-1282-1985 in the High Court in Malaya at Penang wherein the plaintiff had not claimed for the possession or return of the goods, which was an admission that the property in the goods had in fact passed to Avtech and subsequently to the defendants.
>
> In the circumstances, I found myself in agreement with counsel for the defendants who submitted that "the plaintiff would have been aware that having obtained judgment for the price of the goods all the rights of the plaintiff would have merged in the judgment and it would in fact be too late to pursue a claim for the return of the goods from Avtech, let alone the defendants.

In trying to implify the appellant's counsel submitted that in the second claim it was for returning of the goods and this did not contradict the earlier claim he submitted. He added that the first judgment was for the payment of money due under the contract for installation of the aircondition units the title of them was still reserved in the plaintiff.

When we pressed learned counsel for the specific provision of the agreement entered between the parties, spelling all the details to support his submission, counsel was unable to do so.

Having considered counsel's submission, we hold, with respect, that there is no merit in the argument of counsel. We find we agree with the finding of the learned judge when he held we quote:

> My research showed that "merger" is defined, *inter alia*, in the eight edition (third impression, 1996) *Osborn's Concise Law Dictionary* as follows:
>
> > That operation of law which extinguishes a right by reason of its coinciding with another and greater right in the same person, eg, a life estate is merged in or swallowed by the reversion when the two interests come into the hands of the same person. A right of action on a simple contract debt is merged in the right of suing on a bond for the same debt, *and a right of action is merged in a judgment in the sense that no further action may be brought on the debt, but only on the judgment. A special characteristic of the debt, however, such as being a preferential claim in bankruptcy, is not lost merely because judgment is obtained in respect of the debt.* [Emphasis added]

As to appellant's second point learned counsel submitted that the principle of *res judicata* in *Henderson v. Henderson* [1843-60] All ER Rep 378 should not be applied by the learned judge. Counsel with respect, proceeded half-heartedly on this point. We think the learned judge had also considered this point very admirably and we quote p. 15 of his learned judgments:

> At the time the plaintiff filed the claim against Avtech and obtained a final judgment for the price of the goods, which very goods are the subject-matter of this action and the related suit, it elected not to seek the return of the goods, thereby conceding that the title in them had passed to Avtech. Had Avtech not become insolvent and had the plaintiff sought subsequently to bring a further action against Avtech, this time for a declaration that the title in the goods had not passed to Avtech and consequently for their return to the plaintiff, as was being sought to be done in this action and the related suit, this claim would have been met with a plea of *res judicata* on the ground that the matter had been determined with finality between the parties and that the plaintiff could not relitigate the matter by raising a further cause of action which had been available to it at inception when it had first filed the claim against Avtech. It therefore follows that neither could the plaintiff raise that cause of action against the defendants in this action and the related suit as all the plaintiffs rights in respect of the goods would have merged in the judgment and the plea of *res judicata* would be available to the defendants.

As regards the appellant's third ground of appeal it was also very mute and with due respect to learned counsel, he even conceded that appellant could not elect to proceed against the defendants on both claims. It is certainly an answer to this appeal we thought.

The appellant's counsel than came to the crux of the appeal as to why their writ and statement of claim had been struck out on the application of the defendant for reason of non prosecution and for reason of an inordinate delay.

The appellant's counsel submitted that both the plaintiff and defendants are responsible for the delay. Delay he said was because there was negotiation for settlement of the suits outside the court. As regards this allegation, the defendants allegation that because of the delay, their position was prejudiced in that many of his witnesses left not because of anything else. They left because the company went into receivership. At p. 45 of the appeal record is the note of the learned judge recording a complaint by Cik Izabella that her case was prejudiced as a result of the part played by the plaintiff. One Miller, a material witness and all witnesses who played a large part in negotiations leading to the formation of the contract, left a few months after judgment was obtained in 22-1282-85. At p. 47 of the record of appeal in appeal No 604-1995 it is recorded Mr Gan Teik Chee representing the plaintiff said that Miller left in 1986 when the suits was not ready for trial. The order for early trial was given in September 1986 did not affect Miller.

What was uppermost in our minds was if the appellant had any submission to make showing how the judge erred in exercising his discretion to strike the plaintiff's suits on the ground of inordinate delay. With respect we found this was lacking in the submission of counsel for the appellant. Other than feebly trying to give a reason for the delay, the judge's reason for granting the order prayed by the defence could not in any way be faulted.

It was apparent to us that the plaintiffs were clearly ordered to have the cases tried on a priority basis by Justice Dato' Edgar Jr (as he then was) on 18 September 1986 (in encl. 26). On 2 April 1987 the plaintiff changed solicitors and followed by another change to the present solicitors on 12 June 1990.

It is also clear that since 18 September 1986 until the filing of the plaintiffs affidavit dated 30 August 1994, as affirmed by Mr Hoh, and found as a fact by the learned judge, the plaintiff plainly ignored the order for early trial and failed to take out summons for direction or any proceeding to that effect.

We fully agree with the submission made by counsel for the respondent Cik Izabella that in this case delay had prejudiced the defendants in that material witnesses could not and if they could, they could only be located with great difficulty, especially the directors and officers of the first and seconds defendants. Suffice to say the delay had also given the plaintiff an unfair advantage.

Now as far as the related suits were concerned, as stated earlier, Justice Dzaiddin (as he then was) in encl. (37) on 29 September 1986 ordered that the related suits be tried at the same time as the others.

We agree with the learned judge when he held that the defendants' application together in the related suit in encl. (37) in appeal No 13 be struck out, for want of prosecution under O. 34 r. 2(2) of the Rules of the High Court 1980 or under the inherent jurisdiction of the court. Hoh affirmed an affidavit (encl. 36), in support of encl. (37), in the related suit, the facts of which are almost the same except that the plaintiff had filed summons for direction in encl. (26) on 23 January 1987 but he failed to proceed or to obtain any order thereon. On 18 May 1989, the plaintiff after having changed their solicitors, had filed a further summons for direction encl. (28) and obtained an order on 27 September 1989 directing that the suit be set for trial in 60 days. A sealed copy was never served on the defendants. On 7 August 1992 the plaintiff served the defendants a list of documents and an affidavit verifying the list. Hoh said the plaintiff failed to take any steps since 7 September 1989 for trial. This delay prejudiced the defendants in this case.

In this appeal No 13, the plaintiff also filed encl. (43) to strike out the defendants' defence for failure to comply with 27 September 1989 order directing parties to serve on each other a list of documents within 14 days and seeking to enter judgment pursuant to O. 24 r. 16. The defendants averred it is true that the plaintiff had so served the list on *7 August 1992* (see para. 6 affidavit of Hoh dated 30 August 1994 p. 61 of the appeal record). The defendants, however, averred that the plaintiff themselves has also been guilty of delay in not complying with the order dated 28 September 1989, thereby prejudicing the defendants' position. In reality the plaintiff had been guilty of delay themselves without applying for extension of time (14 days). Both parties have made submissions to the learned judge and the learned judge eventually held:

(1) the defendants should succeed in their applications in encl. (26) and encl. (37) in the related action which had the effect of striking out of the plaintiffs action, and

(2) the plaintiff should fail in their application in encl. (43) to strike out the defendants' statement of defence in the related action.

We agree that the judge was correct in dealing with encl. (43) first. We agree that O. 24 r. 16 had no application in this instant as the plaintiff's failure in the main was to act under O. 25 and not O. 24. In actual fact the plaintiff had not applied and acted under O. 24 for discovery and inspection before taking out a summons under O. 25. Plaintiff can be dismissed for the same reason. The plaintiff's failure to obey the court's order is the reason for the delay in the case in encl. (43) and for that it should be dismissed with costs. It is also clear that taking encls. (26) and (37) in the related action together on the facts as found by the learned judge, with which we agree, the plaintiff had clearly been guilty of inordinate delay and had not prosecuted expeditiously.

Finally, it remains for us to say that we uphold the learned judge's decision and the reasons therefor. We do find that the learned judge had exercised his discretion on correct principles, had not committed any error. We therefore unanimously dismiss both appeals with costs.

Abdul Malek Ahmad JCA:

I have read the draft judgment of my learned brother Abu Mansor Ali JCA and agree with the conclusion reached that the two appeals ought to be dismissed with costs and the deposits are to go to the respondents to the account of their taxed costs.

The appellant, who was the plaintiff in both the relevant actions below, had sued the respondents, who are the third and fourth defendants in the subsequent suit (Penang High Court Civil Suit No 22-1643-1985) as receivers and managers of the first and second defendants. At the same time, they are also the defendants in the earlier suit (Penang High Court Civil Suit No 22-1618-1985) as receivers and managers of the property of Atlas Intek (M) Sendirian Berhad. For the purposes of this judgment, the subsequent suit will be referred to as the first suit and the earlier suit as the second suit.

Only three enclosures, namely encl. 26 in the first suit and encls. 37 and 43 in the second suit, warrant consideration in these appeals. On 5 September 1994, the respondents in the first suit had filed an application at encl. 26 to dismiss the action for want of prosecution pursuant to O. 25 r. 1(4) of the Rules of the High Court 1980 (hereinafter "the Rules") or the inherent jurisdiction of the court.

Their supporting affidavit affirmed on 30 August 1994 averred that the appellant had filed its claim on 27 December 1985 on the ground that the respondents had failed to permit the appellant to remove the air conditioning system and other equipment the appellant had delivered to and installed on

the respondents' premises pursuant to agreements between the appellant Avtech Construction Sendirian Berhad (hereinafter "Avtech"). The respondents' statement of defence was filed on 18 April 1986.

An early trial had been ordered on 18 September 1986. However, no hearing was held and instead there had been two notices of change of solicitors for the appellant on 2 April 1987 and 12 June 1990. In fact, the order for an early hearing had been totally ignored by the appellant as not even the relevant summons for directions had been applied for.

The respondents' contention was that there had been excessive and inordinate delay on the part of the appellant in prosecuting this action and this in turn had prejudicially affected the respondents as their relevant witnesses could not be located or could only be located with great difficulty giving the appellant, whose witnesses were available, an unfair advantage over the respondents.

At the same time, an order had also been made in the second suit on 29 September 1986 for the two actions to be tried together. Since the appellant had failed to initiate any action in the second suit, which was in essence similar to the first suit, the respondents there had applied by encl. 37 under O. 34 r. 2(2) of the Rules or pursuant to the inherent jurisdiction of the court to strike it out for want of prosecution.

The only difference between these two applications was that the appellant had filed a summons for directions on 23 January 1987 in the second suit but had failed to proceed with the hearing. However, on 18 May 1989, the appellant had filed a second summons for directions and obtained an order on 27 September 1989 directing it to be set down for trial within sixty days. The sealed copy of the relevant order was never served on the respondents but the appellant served on the respondents a list of documents and an affidavit verifying the list on 7 August 1992. Nevertheless, the appellant did not take any action after this which had resulted in the respondents' application in encl. 37 in the second suit.

The third application at encl. 43 in the second suit was by the appellant to strike out the defence for failure to comply with the court order dated 27 September 1989 in not serving on the appellant a list of documents and an affidavit verifying the same within fourteen days of the order. The appellant also sought to enter judgment pursuant to O. 24 r. 16 of the Rules.

The appellant's affidavit in support stated that the appellant had complied with that same order on 3 August 1992. It must be observed here with some emphasis that the appellant did not at all explain why they had filed the relevant documents outside the fourteen day period without first applying for enlargement of time.

The learned trial judge had concluded, as regards encl. 26 in the first suit and encl. 37 in the second suit, that the appellant had not prosecuted both actions as expeditiously as they should have leaving the respondents with no witnesses as the foreign ones had left the country and could not be located with some amount of difficulty after the companies went into receivership and the remaining local director was going to be a hostile witness in view of developments.

In any event, the learned trial judge was of the view that the appellant had obtained a final judgment against Avtech on 28 October 1985 for the price of the same goods in question which very goods are the subject matter of the first and second suits, which was an admission that the property in the goods had in fact passed to Avtech and consequently to the respondents. Consequently, it was also the considered opinion of the learned trial judge that the appellant could not raise the cause of action against the respondents in the first and second suits as all the appellant's rights in respect of the goods would have merged in the judgment and the plea of *res judicata* would have been available to the respondents.

As for encl. 43 in the second suit, the learned trial judge held that O. 24 r. 16 of the Rules had no application as the breach complained of was a failure by the respondents to comply with an order made on a summons for directions under O. 25 and not O. 24 of the Rules. It also ruled that the appellant was equally as blameworthy as the respondents in failing to comply with the order of the court as regards the time frame of fourteen days from the date of the order and took the view that the appellant was hoisted by its own petard.

Accordingly, he had allowed encls. 26 in the first suit and encl. 37 in the second suit, and dismissed encl. 43 in the second suit, with costs. We had considered his well reasoned judgment and the submissions of learned counsel for both the appellant and the respondents before us and found no reason to disagree with the findings of the learned trial judge in both the appeals. This had resulted in us making the orders we made.